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PRESUMPTION IN FAVOUR OF THE RAPE VICTIMS UNDER THE EVIDENCE ACT, 1872: TRACING THE SOCIAL, LEGAL AND ETHICAL IMPACT

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I. ABSTRACT

The Justice System of India does assume innocence and gives it greater importance than focusing on punishment and conviction. Therefore, naturally in most cases, the burden to prove that accused has committed said offence lies on the prosecution. However, there are exceptions to this rule including the offence of rape. Rape victims are made to experience the offence twice – once when it happens and again when the trial goes on. This is because of the pre-existing myths and stereotypes that hound the victims. This paper attempts to analyse the idea and impact of presumption of consent by studying relevant law commission reports and case laws.

II. Keywords:

Presumption of consent, Evidence Act, Rape Legislation, Rape Myths.

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III. INTRODUCTION

One of the most basic underlying principles of the Criminal Justice System is that an accused is "innocent until proven guilty". However, after the efforts and protests that lasted for an eternity, the legislature made an exception to this principle in case of certain rape laws. By adding *Section 114A* to the *Indian Evidence Act, 1872*, the *Criminal Law (Amendment) Act, 1983* attempted to lessen the influence of rape stereotypes by shifting the burden of proof for "consent" in rape cases on the accused. In cases of custodial rape, a legal presumption was established against the accused if the victim alleged that the act was carried out without her consent.

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In the courtroom, the notion that when a woman says "no," she really means "yes" has to be refuted. The burden to prove existence of consent shifts on the accused but only after the prosecution has established sexual intercourse beyond reasonable doubt. Rape victims pay a double price – in addition to enduring the awful bodily and mental harm that other victims of violent crimes undergo, they also have to bear the responsibility of defending their suffering. This paper discusses various aspects of substantive and procedural disparities of the legal system and the effect of presumptions established in favour of victims.

Rape, as often described in various judicial precedents, is a crime against humanity. In legal judgements, the victim's social and personal ramifications from the rape have repeatedly been acknowledged and emphasised in the Indian setting. However, the Indian judiciary has come from an extremely narrowed perspective of rape and rape victims. The stereotypical image of rape victims has resulted in and from rape myths that have had a detrimental effect on the judicial view of rape.

This paper analyses the legal and judicial evolution of rape laws and myths, how they led to the creation of legal presumptions, to determine their overall social and ethical impact. The ramifications of this presumption for the legal system, societal perceptions of rape victims, and ethical issues raised by its use will all be explored in this study. The study will clarify whether the legal presumption is effective and point out areas that require improvement in order to guarantee that sexual assault victims receive support and justice.

IV. LEGAL BACKGROUND

The notions of male superiority, female inferiority, and sexual morality continued up until 1983, when a conscious legislative effort was made to alter the rape legislation in order to adequately protect women and maintain their independence and liberty in society.

The *Criminal Law (Amendment) Act, 1983* was the initial conscious legal effort that brought major changes in the substantial and procedural aspects of rape. The *Indian Evidence Act, 1872* was amended to include *Section 114A*, which gave the accused in cases of severe rape the burden of proving "consent." In cases of custodial rape, a legal

presumption was established against the accused if the victim alleged that the act was performed without her consent. The general rule that an accused person is presumed innocent until and unless proven guilty was broken in this case.

There have been four Law Commission reports between 1956 and 2009 that have discussed rape. Out of these, two of them discussed rape in IPC in general and discussed the related provisions and reforms. The difference between how "consent" was interpreted in *Section 375* and how it was defined in *Section 90* of the IPC was considered by the *42nd Law Commission*.[2] The issue of consent was discussed in detail in the *84th Law Commission report* titled *Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence, 1980*[3], where recommendations were given on matters such the terminology, matter of consent, burden of proof, detention procedures, and trial-related concerns.

This report came after there was a nationwide protest in response to the Bombay High Court's decision in ***Tukaram v. State of Maharashtra***[4] judgment, infamously known as the Mathura rape case[5]. The Commission recommended the presumption regarding consent to be inserted as *Section 114A* to the *Indian Evidence Act, 1872*. Finally, the following is the excerpt that was added to the Evidence Act and it remains the same to date:

> "114A. Presumption as to absence of consent in certain prosecution for rape. ––In a prosecution for rape … *[in certain listed clauses]* … where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such ***woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent***."[6]

However, the Commission noted that the use of *"shall not"* does not mean that evidences against the presumption are debarred. It was noted that if a superior

[2] See *supra* note 3.
[3] P. V. DIXIT, EIGHTY FOURTH REPORT ON RAPE AND ALLIED OFFENCES: SOME QUESTIONS OF SUBSTANTIVE LAW, PROCEDURE AND EVIDENCE, 1980 1–45 (84 ed. 1980).
[4] Tukaram v. State of Maharashtra 994 SCC (1) 465 JT 1993 Supl., 135.
[5] *Ibid*.
[6] Indian Evidence Act, 1872 § 114A.

individual in any position of power or authority engages in sexual activity with a woman that is his subordinate or is under his or her authority, the burden to prove consent lies on the accused. Several women's organisations that were working with the Commission on this issue suggested the addition of an explanation below *Section 375* that stated –

> "A mere act of helpless resignation in the face of inevitable compulsion, acquiescence, non-resistance and passive giving in when volitional faculty is either clouded by fear or vitiated by duress cannot be deemed to be consent."[7]

The report, however, remained satisfied with only adding the terms "free and voluntary" consent to the section and deemed it adequate. It is impertinent to note that even the above-mentioned term has not yet been added to *Section 375*.

In 2003, *J.P. Modi* propagated a test called the two-finger "test" to be used to determine virginity and the sexual conduct of the victim.[8] The two-finger "test" and documenting the results became regular medical practise for evaluation of a rape victim. Around this time, the Parliament overturned a section of the *Indian Evidence Act* barring the admission of the victim's prior sexual history in rape prosecutions.[9]

This vile and humiliating, bearing zilch scientific acceptance, two-finger test became a routine practice over the years in medical examination of rape victims. In 2013 a bench of *Justice DY Chandrachud* and *Justice Hima Kohli* abolished the test noting that such test is based on an incorrect assumption that a woman who is sexually active cannot be raped. "Nothing could be further from the truth – a woman's sexual history is wholly immaterial while adjudicating whether the accused raped her", the bench noted.[10] This was one of the few sensitive judgments that came in favour of rape victims.

As of today, by the virtue of the legal presumptions, victims are no longer "legally" treated as accomplices to the offence of rape. Under *Section 118* of the *Indian Evidence*

[7] See *supra* note 13.
[8] See *supra* note 2.
[9] *Ibid.*
[10] State of Maharashtra v. Chandraprakash Keval Chand Jain 1990 AIR 658, 1990 SCR (1) 115.

Act, a rape survivor is unquestionably a qualified witness.[11] A victim's testimony need not be corroborated. A victim of rape shall be treated with similar caution as a victim of any other injury. The purview of the courts has been discussed in chapters ahead.

V. SOCIAL COMMENTARY

A. Rape Myths and Gender Stereotypes and their impact on Judicial Precedents

Judiciary has often been called the mirror image of contemporary social ideals. The standard of upholding morale and ethicality of a subject has always varied over the time. It is an ever-changing and ever-evolving process fuelled by various factors. Legislation, although, has always sided with their idea of "justice" and used the necessary legal instruments and notions to reach the state of justice. In this process, it takes inspiration from societal standards and norms of understanding of ethical and moral issues.

Rape, in Indian legislation, has been penned down as a gender-specific law. The law is aware and engrained with medical terminologies related to the offence. However, as soon as one touches the practical grounds, the moral and socially aware aspect gushes in. Arguments in a court of law are not often based on the medical aspect of the offence of rape – not now, not ever. Despite law reforms, rape myths and gender stereotypes have always been a part of the debate, the arguments and have stayed in trials as the unwritten precedents.

Rape myths are "prejudicial, stereotyped, or false beliefs about rape, rape victims and rapists"[12], such as, the reaction of a rape victim to the offence, what an accused would do after the committing rape, admissibility of victim's sexual history, presence or absence of suggestive injuries from the bodies of accused or victim etc. This section of the paper studies aims at studying judicial precedents with respect to pre-conceived gender notions and presumptions.

As early as in 1952, the Supreme Court had ruled that the testimony of the victim could be the sole-basis of the testimony of the victim. Even after this, the system felt

[11] See *supra* note 16.
[12] See *supra* note 2.

the need to arrange devious tests to judge a victim's moral character and previous sexual history up until 2003 and 2013. Such character evidence was admissible in the court to question the credibility of the testimony.[13]

A certain demeanour was expected of the rape victims. In ***Kamalanathha v. State of Tamil Nadu***[14], the judge stated called the victim's testimony more believable as the judge in the Trial court had noted that the victim's testimony was more believable as there was a "torrential flow of tears from the eyes of [victim]".[15]

When in ***Bharwada v. State of Gujarat***[16], a man sexually assaulted some minor friends of his daughter's, *Justice A.P. Sen* and *Justice M.P. Thakkar* deemed it necessary to comment on the reasons why a rape victim's testimony is believable without the requirement of corroboration. It was noted in the judgment that a girl as young early adolescent years of 10 or 12 in India, is aware of the fact that a rape accusation would "jeopardize" the reputation of the family and her "future chances of getting married and settling down in a respectable or acceptable family would be greatly marred".[17]

The myths work the worst when there is a need for corroborating victim's statement. The judges tend to take such myths into consideration while deciding whether to believe the victim's version or not. In ***Pratap Mishra v. State of Orissa***[18] a conviction of gang rape was set aside saying that, "[I]f the story of the prosecutrix was true, then we should have expected an injury or bruise-mark on the breasts or chest or on the thighs or other part of the body".[19]

Every woman is a possible victim of rape; there is no such thing as a "typical rape victim"; lesbians, virgins, old women, young girls, disabled women, mentally ill women and women of every colour and socioeconomic background are all victims of rape. The offence of rape is beyond race, caste, ability and even gender. Such stereotypes only derail the narrative and make it hard for victims to present their

[13] See *supra* note 3.
[14] Kamalanathha v. State of Tamil Nadu, (2005) 5 SCC 194.
[15] *Ibid*.
[16] Bharwada v. State of Gujarat, (1983) 3 SCC 217.
[17] *Ibid.*
[18] Pratap Mishra v. State of Orissa, (1977) 3 SCC 41.
[19] See *supra* note 26.

stories truthfully, even after the legal presumption provided. In addition, the "burden of performance" on the victims to react a certain way during and after the commission of offence is upsetting and negatively affects the narrative of victims.

VI. CONCLUSION AND SUGGESTIONS

Many people in society, including jurors in rape trials, have rape myths, which are ubiquitous and dangerous sets of ideas. These beliefs can significantly influence the way rape trials are conducted and can result in biased and unfair decisions for sexual assault victims.

Judges, attorneys, and jurors must be informed on the truths relating to sexual assault and comprehend the effects that these myths may have on victims in order to battle these misconceptions. We can ensure that sexual assault victims receive the justice they deserve by dispelling these stereotypes and striving to establish a more just and equitable legal system.

The *Indian Evidence Act's* presumption of consent in rape proceedings has generated debate and significantly impacted rape victims. If a person does not expressly object to a sexual conduct, the law presumes that they have given their agreement to it. This assumption can be especially troublesome when the victim may have been intimidated or coerced into keeping quiet.

Due to fear, shock, or trauma, rape victims frequently do not aggressively resist the attacker. This does not imply that they have given their consent for a sexual act, though. Yet, the presumption of consent may cause rape victims to be held responsible and may also be used to defend the offender.

The culture of victim-blaming, which questions victims about their conduct and acts prior to the rape rather than focusing on the actions of the perpetrator, has also been influenced by the assumption of consent. The victim may be traumatised by this, which may deter them from reporting the rape or demanding retribution.

Legislators and activists have been working to change India's rape and consent laws in recent years. For instance, the *Criminal Law (Amendment) Act of 2013* added additional rape and sexual assault-related laws, including the recognition of marital

rape and the use of force or coercion to obtain permission. To change cultural perceptions of rape victims and establish a legal system that is more accommodating to their requirements and experiences, there is still more work to be done.

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